No. 18-1012

In The Supreme Court of the United States

PATRICK LAFFERTY and MARY LAFFERTY,

Petitioners,

v.

WELLS FARGO BANK, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Third Appellate District

BRIEF IN OPPOSITION

JAN T. CHILTON
Counsel of Record

SEVERSON & WERSON,
A PROFESSIONAL CORPORATION
One Embarcadero Center, 26th Floor
San Francisco, CA 94111
(415) 398-3344
jtc@severson.com

Counsel for Respondent Wells Fargo Bank, N.A.

February 28, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS FOR REVIEW

1. Did the Court of Appeal correctly interpret the FTC Holder Rule's second sentence as limiting a debtor's recovery of attorney fees as well as damages on a claim against the seller that the debtor may bring against a holder of the contract solely by reason of the FTC Holder Rule?

2. Did the Court of Appeal correctly hold that California Civil Code section 1780(e) does not give a debtor a claim for attorney fees against the holder of the contract that is independent of the FTC Holder Rule when the debtor sues based on the seller's misdeeds?

LIST OF PARTIES

The caption contains the names of all the parties to this case.

CORPORATE DISCLOSURE STATEMENT

Wells Fargo Bank, N.A. is wholly owned by Wells Fargo & Company, which is a publicly held corporation whose stock is traded on the New York Stock Exchange under the symbol WFC.

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BRIEF IN OPPOSITION

INTRODUCTION

Though the petition highlights implied rights of action and federal preemption in an effort to obtain this Court's review, the real issue here is attorney fees.

Petitioners Patrick and Mary Lafferty ("the Laffertys"), or more accurately, their attorney, sought nearly $2 million in attorney fees after securing the Laffertys a $68,000 stipulated judgment against respondent Wells Fargo Bank, N.A. ("Wells Fargo"), the holder of the Laffertys' retail installment contract for a motor home.

The stipulated judgment was entered on claims that the motor home's seller, Geweke Auto & RV Group ("Geweke") was negligent and violated California's Consumers Legal Remedies Act ("CLRA"; Cal. Civ. Code, § 1750 et seq.).

On an earlier appeal in this case, the Court of Appeal reversed dismissal of these two claims, allowing the Laffertys to "proceed to trial on these two causes of action against Wells Fargo Bank that the Laffertys would otherwise have had only against Geweke . . . but for the [FTC] Holder Rule [16 C.F.R. § 433.2]." *Lafferty v. Wells Fargo Bank, N.A.*, 213 Cal. App. 4th 545, 572-73, 153 Cal. Rptr. 3d 240, 260 (2013) ("*Lafferty I*").

On this third appeal in the same case, the key legal issues were (1) whether the FTC Holder Rule's second sentence limited recovery of attorney fees as well as damages and, if so, (2) whether the CLRA or

other California state law granted the Laffertys a right to an attorney fee award against Wells Fargo that was independent of, and hence not limited by, the FTC Holder Rule.

Carefully parsing its text, the Court of Appeal concluded that the FTC Holder Rule's second sentence limited any amount the debtor might recover under the Holder Rule "regardless of what kind of a component of the recovery it might be—whether compensatory damages, punitive damages, or attorney fees." App. 15a-18a.

The Court of Appeal went on to hold that California law did not grant the Laffertys an independent right to an attorney fee award against Wells Fargo because they did not sue Wells Fargo directly under the CLRA, but only sought to hold Wells Fargo liable for Geweke's CLRA violations via the FTC Holder Rule. App. 25a-26a.

The Laffertys have not sought this Court's review of either of these central holdings of the Court of Appeal decision. Their petition raises no issue as to the scope or meaning of the FTC Holder Rule's second sentence limiting the debtor's recovery. The petition does not challenge the Court of Appeal's interpretation of that sentence.

The petition also raises no issue regarding the Court of Appeal's determination that California law afforded the Laffertys no claim for attorney fees against Wells Fargo independent of the FTC Holder Rule. The Court would not review such an issue anyway. *See* 28

U.S.C. § 1257(a); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945).

Instead, the Laffertys try to win review on two other issues that the case does not properly raise. First, the Laffertys pose an issue as to whether 16 C.F.R. § 433.2, itself, gives rise to an implied private cause of action. It does not. The Court of Appeal did not hold otherwise. Indeed, it even cited *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 987 (D.C. Cir. 1973) for the proposition that there is no private right of action to enforce the FTC Act. App. 25a. Nor did the Laffertys press their implied right of action argument in the Court of Appeal.

The Laffertys' second issue is even further afield. The Court of Appeal opinion does not even contain the word "preemption"—much less hold that the FTC Holder Rule preempts any California law.

Moreover, the Laffertys have not tried to, and could not, show any deep and entrenched conflict among decisions of either lower federal courts or state courts on the issues their petition presents. Nor is either of those issues of sufficient importance to warrant this Court's review.

For all of these reasons, the Court should deny the Laffertys' petition.

STATEMENT OF THE CASE

1. In 2005, the Laffertys bought a motor home from Geweke, signing a retail installment contract, agreeing to pay $389,929 over 239 months. Geweke assigned the Laffertys' contract to Wells Fargo.

The Laffertys encountered problems with the motor home almost immediately. When Geweke did not fix the motor home, the Laffertys left it with Geweke and stopped paying Wells Fargo on their contract. Wells Fargo took possession of the motor home, but did not attempt to collect any money from the Laffertys.

2. The Laffertys filed suit against Geweke, Wells Fargo, and several other defendants, alleging a wide variety of claims, some of which were resolved in Wells Fargo's favor by demurrer, others by summary judgment.

On the Laffertys' appeal from the ensuing judgment, the Court of Appeal held that the FTC Holder Rule permits a debtor to assert against the holder of the contract affirmative claims for relief as well as defenses that the debtor has against the seller. *Lafferty I*, 213 Cal. App. 4th at 558-63, 153 Cal. Rptr. 3d at 249-53. The court cautioned, however, that the FTC Holder Rule's second sentence limited the debtor's recovery on those affirmative claims.

> [W]e hold—to the extent the Laffertys have causes of action against Geweke that are also valid against Wells Fargo by operation of the Holder Rule—their recovery is limited to the amount they have paid under the installment

> contract. The Holder Rule expressly states, "recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder."

Id., 213 Cal. App. 4th at 563, 153 Cal. Rptr. 3d at 253.

The Court of Appeal reversed the dismissal, on demurrer, of two claims for negligence and violation of the CLRA, directing that "[o]n remand, Patrick and Mary Lafferty may proceed to trial on these two causes of action against Wells Fargo Bank that the Laffertys would otherwise have had only against Geweke Auto & RV Group but for the Holder Rule. . . ." *Id.*, 213 Cal. App. 4th at 572-73, 153 Cal. Rptr. 3d at 260.

3. On remand, the parties stipulated to entry of a $68,000 judgment on the two remanded claims. The judgment also provided that for purposes of applying the Holder Rule, the total amount the Laffertys actually paid under their contract for the motor home was $68,000. App. 7a, 72a.

The Laffertys then filed two motions for awards of attorney fees totaling $1,980,070. App. 8a. The trial court denied the motions, holding that the FTC Holder Rule's second sentence capped attorney fees as well as damages. App. 57a-59a. Since the stipulated judgment already awarded the Laffertys the entire amount they paid under the contract, the Holder Rule barred any added recovery of attorney fees. App. 59a. The Laffertys appealed from the denial of their attorney fee motions. App. 8a-9a.

4. The Court of Appeal opened the analysis section of its opinion with a general description of the origin, purpose, and principal features of the FTC Holder Rule. App. 12a-15a. In addition to providing debtors with a defense to a creditor's collection action, the court said, "the FTC also provided consumers with a new cause of action against their creditors. This new cause of action allows consumers to assert against the creditors 'all claims and defenses which the debtor could assert against the seller of goods or services'. . . ." App. 14a. "Thus, the FTC declared that 'a consumer can . . . maintain an affirmative action against a creditor who has received payments for a return of monies paid on account.'" *Id*. "This new cause of action, however, was expressly constrained" by the FTC Holder Rule's second sentence. *Id.*

The Court of Appeal then turned to a detailed exegesis of that sentence's key words, holding that "recovery" was a broad term encompassing all forms of damages as well as attorney fees. App. 15a. "Shall not exceed amounts paid by the debtor" limits affirmative recovery against the holder to a return of monies paid under the contract. App. 16a. And "hereunder," shows that the limitation on affirmative recovery applies only to recovery under the FTC Holder Rule, not "to separate causes of action that might exist independently under state or local law." App. 17a-18a.

After disposing of other contentions, the Court of Appeal turned to the Laffertys' claim they were entitled to an attorney fee award under the CLRA. App. 24a-26a. The Court of Appeal noted that the Laffertys

did not sue Wells Fargo directly under the CLRA, but instead, as *Lafferty I*'s disposition stated, proceeded against Wells Fargo on a claim that but for the FTC Holder Rule they could have brought only against Geweke. App. 25a.

> True, the Laffertys "borrowed" the CLRA action for purposes of asserting a claim for relief against Wells Fargo. However, their recovery against Wells Fargo was attributable to the cause of action under the Holder Rule.

Id.

"For purposes of the CLRA," the Court of Appeal continued, "borrowing a cause of action under the CLRA is not the same as a cause of action 'filed pursuant to' Civil Code section 1780," and "[w]ithout a direct claim under the CLRA, the Laffertys are not entitled to attorney fees under Civil Code section 1780 against Wells Fargo." App. 26a. Thus, the Court of Appeal affirmed the post-trial orders "denying attorney fees under Civil Code section[] . . . 1780." App. 40a.

5. The Court of Appeal denied the Laffertys' rehearing petition, and the California Supreme Court denied their petition for review as well as several requests for depublication of the Court of Appeal opinion. App. 42a, 44a.

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REASONS FOR DENYING THE WRIT

The Laffertys' petition for certiorari should be denied. The petition does not address or raise any issue concerning the core holdings of the opinion below.

The case does not properly present either of the two questions the petition frames. The Court of Appeal did not hold that the FTC's regulation, itself, creates a new private right of action, but only that the language it requires in consumer credit contracts does so. Also, the Court of Appeal opinion does not use the word "preemption" or hold that the FTC Holder Rule preempts California law.

Moreover, the Laffertys did not preserve their first issue in the lower courts. The Laffertys have not shown there is any abiding conflict of decisions on either of the questions their petition raises or that either issue is of such importance as to warrant the Court's review.

A. The Laffertys' Petition Does Not Challenge Or Present Any Question About The Court Of Appeal's Core Holdings

1. The Court should deny the petition as it does not challenge or present any questions about the Court of Appeal opinion's central holdings.

The opinion below rested on three key propositions, the first, an interpretation of the FTC Holder Rule; the second, an application of California law, and the third, a question of fact.

The Court of Appeal interpreted the FTC Holder Rule's second sentence as capping a debtor's recovery of attorney fees as well as damages against the holder of the contract. App. 15a, 18a. However, it also held that the cap applies only to a recovery under the Holder Rule, not "to separate causes of action that might exist [against the holder] independently under state or local law." App. 17a-18a.

The Court of Appeal also examined California's CLRA and held that the CLRA did not grant the Laffertys a claim for damages or attorney fees against Wells Fargo independent of the FTC Holder Rule. App. 24a-26a. The Court of Appeal concluded that "[w]ithout a direct claim under the CLRA, the Laffertys are not entitled to attorney fees under Civil Code section 1780 against Wells Fargo." App. 26a.

Finally, the Court of Appeal determined that the Laffertys had already recovered the full amount they had paid under their contract. *See* App. 7a, 30a-33a. Based on those three holdings, the Court of Appeal concluded that the FTC Holder Rule's second sentence prevented the Laffertys from obtaining an additional award of attorney fees on the CLRA claim that "but for the Holder Rule" they could have brought "only against Geweke." App. 6a.

2. The Laffertys' petition does not challenge or raise any question for review about these three holdings on which the Court of Appeal's affirmance rested. The petition does not claim that the Court of Appeal misinterpreted the FTC Holder Rule's second

sentence. It does not argue that the sentence limits only damages, not attorney fees. Nor does the petition contend that the CLRA grants the Laffertys a right, independent of the FTC Holder Rule, to recover attorney fees from Wells Fargo based on Geweke's CLRA violations. The petition does not challenge the Court of Appeal's determination that the Laffertys had already recovered all sums they paid under their contract.

By its silence on these key propositions that underpinned the ruling below, the petition tacitly concedes that the Court of Appeal correctly decided the Laffertys' appeal. Moreover, because the Court of Appeal's affirmance is fully supported by those three unchallenged holdings, a ruling by this Court on the two questions that the Laffertys' petition raises would not result in a reversal or otherwise change the outcome of their appeal. The Court does not grant certiorari to render advisory opinions or to edit a lower court's opinion on issues peripheral to its disposition.

B. This Case Does Not Present, And The Laffertys Did Not Preserve, Their Question About Implied Private Rights Of Action

As clarified by the citation to *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001), the first question presented by the Laffertys' petition is whether the FTC's Holder Rule regulation (16 C.F.R. § 433.2) itself gives rise to an implied private cause of action by the debtor against the holder of the contract. *See* Pet. i, 21-22.

This case does not present that issue, nor did the Laffertys preserve it.

1. The Court of Appeal opinion states that the FTC "also provided consumers with a new cause of action against their creditors," App. 14a, but the opinion does not even hint that the new cause of action arises by implication from 16 C.F.R. § 433.2 itself.

That the FTC intended to and did give debtors a new affirmative right of action against their creditors is beyond question. The FTC's Statement of Basis and Purpose for the Holder Rule explained that the rule required all consumer credit contracts to contain "a provision which allows the consumer to assert his sale-related claims and defenses against any holder of the credit obligation." FTC, Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 50 Fed. Reg. 53506, 53524 (Nov. 18, 1975). "From the consumer's standpoint, this means that a consumer can . . . maintain an affirmative action against a creditor who has received payments for a return of monies paid on account." *Id.*

The FTC did not create this new claim for consumers against creditors directly by regulation or by implication from its regulation, but rather by enforcement of the FTC-required Holder Rule language under ordinary common law contract principles. As FTC staff guidelines published a year after the rule's adoption explained, when the regulation requires the Holder Rule Notice to be inserted in a contract, "the Notice will become a part of the agreement between the consumer

and the creditor. The required Notice will be treated in the same manner as other written terms and conditions contained in the agreement." FTC, Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20022, 20023 (May 14, 1976) ("FTC Guidelines").

The Laffertys agree. Their petition states repeatedly that the FTC achieved its goal of granting consumers new rights against creditors by requiring the credit contract to include language that would be enforced under "the standard common law of contracts." Pet. 18, 22, 23.

The Court of Appeal opinion says nothing to the contrary. As mentioned, the opinion states that the FTC Holder Rule provides consumers a new cause of action against their creditors, but it does *not* say that the new claim arises from 16 C.F.R. § 433.2 either directly or by implication—as opposed to arising from enforcement, under common law contract principles, of the language that the regulation requires consumer credit contracts to include. *See* App. 14a. To the contrary, the Court of Appeal opinion quotes *Holloway*, 485 F.2d at 987 for the proposition that "private actions to vindicate rights asserted under the [FTC] may not be maintained." App. 25a.

Since the FTC Act confers no private right of action, neither could any regulation that the FTC adopted under that Act. *Alexander*, 532 U.S. at 291. Undoubtedly, the Court of Appeal would have carried its analysis to that last step had the Laffertys raised

Alexander or argued that no new cause of action could be implied from 16 C.F.R. § 433.2 itself, as a matter of substantive federal law. As the Laffertys never did so, the Court of Appeal never expressly addressed or ruled on the question that the Laffertys seek to have this Court review.

2. "Under [28 U.S.C. § 1257(a)] and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citations omitted); *see also Illinois v. Gates*, 462 U.S. 213, 218-24 (1983).

As just shown, the Court of Appeal did not expressly address or decide the question that the Laffertys' petition seeks to raise regarding implied private causes of action. "Nor have [the Laffertys] met their burden of showing that the issue was properly presented to that court." *Adams v. Robertson*, 520 U.S. 83, 86-88 (1997). The Laffertys' petition is silent on the subject.

In fact, the Laffertys' pre-decision appellate briefs in the Court of Appeal did not cite *Alexander* or present any argument to the effect that, as a matter of federal law, no private cause of action could be implied from 16 C.F.R. § 433.2 itself.

The Laffertys' rehearing petition did not cite *Alexander* either. It devoted only three sentences to

deprecating the opinion's discussion of a new cause of action without mentioning that a cause of action could not arise by implication from a federal regulation if the federal statute did not create the claim.[1]

Because the implied right of action question was not pressed or ruled on below, the Court should deny review.

C. This Case Does Not Present The Laffertys' Second Question Regarding Federal Preemption

1. This case does not present the Laffertys' second question about whether the FTC Holder Rule preempts the CLRA's attorney fee provision, Civil Code § 1780(e).

The Court of Appeal opinion does not mention, much less rely on, federal preemption as a reason for

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[1] Rehearing Pet. 15 ("The court wrongly invented a new 'cause of action,' e.g., 'per Holder Rule.' The Holder Regulation creates no 'cause of action.' If the bank chooses to include the Holder Legend in its RISC, it creates a consumer contract right enforceable under contract law. (Opinion, pps.11, 12, 15, 28)").

The Laffertys' petition for review by the California Supreme Court—not the court that rendered the decision the Laffertys ask this Court to review—devoted four pages to arguing that the Holder Rule "creates no new cause of action ***in California***." Pet. for Review 31-35 (emphasis added). Again, the petition did not cite *Alexander* or argue that as a matter of substantive federal law a regulation could not give rise to an implied private right of action absent a statute that allowed such a claim. It also failed to show why the Court of Appeal would or should have reached a different disposition based on that principle of federal law.

holding that the Laffertys were not entitled to an attorney fee award under the CLRA. *See* App. 24a-26a. Instead, as already explained, the Court of Appeal reasoned that (1) the FTC Holder Rule's second sentence limited attorney fee awards as well as damages, (2) the Laffertys had already recovered all amounts they paid under their contract, and (3) the CLRA did not provide a basis, independent of the Holder Rule, for awarding attorney fees. App. 7a, 15a-18a, 24a-26a, 30a-33a.

The petition does not explain why the three legs on which the Court of Appeal opinion stands are insufficient to support its affirmance of the order denying attorney fees without any decision on whether the FTC Holder Rule preempts any state law.

2. Instead, the petition hints at an assertion that, if treated as an ordinary contract provision rather than a preemptive federal regulation, the FTC Holder Rule would be invalidated by the CLRA's anti-waiver provision, Cal. Civ. Code, § 1751, insofar as its second sentence limits recovery of attorney fees. That assertion raises only a question of California law, not a federal question appropriate for this Court's review.

The hinted-at assertion is also wrong. However it is treated, the FTC Holder Rule grants consumers additional rights and remedies, and its second sentence limits only those additional remedies, not "'any other rights the consumer may have as a matter of local, state, or federal law.'" App. 17a (quoting FTC Guidelines, 41 Fed. Reg. at 20023). Thus, the FTC Holder Rule does not waive any rights the CLRA grants

consumers. For that reason, even if treated as an ordinary contract clause, the Holder Rule is not invalidated by the CLRA's anti-waiver provision.

As this case raises no issue regarding federal preemption, the petition should be denied.

D. The Petition Does Not Show Review Is Needed To Resolve Conflicting Decisions Or To Decide An Important Question

The petition should also be denied because the petition shows neither that there is any conflict among existing decisions on either of the questions it presents for review nor that either of those questions is of sufficient importance to warrant this Court's review.

The FTC promulgated the Holder Rule in 1975. Though millions of consumer credit contracts are written each year, the Holder Rule has not attracted much judicial attention. It took 43 years for a California appellate court to reach and resolve the issue of whether the Holder Rule limited attorney fee recovery or only damages.

Only a smattering of other courts have addressed the issue, likely because California and most other states have enacted their own consumer protection laws that often provide consumers greater rights and more puissant remedies than the FTC Holder Rule does.

The paucity of lower court decisions on the subject strongly suggests neither question presented by the

Laffertys' petition is of such importance as to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAN T. CHILTON
Counsel of Record

SEVERSON & WERSON,
A PROFESSIONAL CORPORATION
One Embarcadero Center, 26th Floor
San Francisco, CA 94111
(415) 398-3344
jtc@severson.com

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